HSUWA Submission in Response to the Interim Report of the Ministerial Review of the State Industrial Relations System

1 May 2018

The submissions that follow are in addition to verbal submissions and commentary made at the consultations with Unions held at Unions WA. We have not attempted to further address all of the issues we canvased at that meeting but to focus on a few issues that are of particular importance to our Union. That is not to suggest that other issues addressed at the meeting with Unions and in particular in the submissions of Unions WA are not of significant importance.

As for the very many recommendations in the Interim Report in regard to which these submissions are silent, we adopt the submissions of Unions WA.

In responding to the Interim Report we refer to the "Proposed Recommendations and Requests for Additional Recommendations" Commencing at page 11 of the Interim Report, and the terms of reference and the paragraph numbering therein.

Term of Reference 1
Review the structure of the Western Australian Industrial Relations Commission with the objective of achieving a more streamlined and efficient structure.

Paragraphs 1. to 13. inclusive and paragraph 14. (a) to (c) inclusive:

We adopt the submissions of Unions WA.

Paragraph 14. (d), conciliation by phone:

- The HSUWA supports the WAIRC having the power to conduct conciliations by telephone, particularly where one or both of the parties are located away from the Perth Metropolitan area. Our preference is face to face conferences, particularly in dealing with workplace disputes.
- In order to ensure that telephone conferences do not become the default option, the parties to have the right to request a face to face conference, which the Commission can only refuse where such a conference would cause a significant hardship to the other party.
- Should perhaps refer to telephone or other electronic means.

Paragraphs 15. to 22. inclusive:

We adopt the submissions of Unions WA.

Term of Reference 2
Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.

Paragraphs 23. to 27 Inclusive – Abolition of the PSAB and the PSA and transfer to the

WAIRC proper and relevant considerations.

Abolition of the PSAB and of the PSA involve different considerations. Accordingly they are addressed separately below.

In regard to the PSAB:

- In our initial submission to the Review, the HSUWA proposed that the PSAB be abolished and that its jurisdiction be given to the Public Service Arbitrator (See HSUWA Submission pages 5 and 6.)
- Referral of the role of the PSAB to the Commission is a different matter to referral of the jurisdiction of the PSAB to the PSA and has a number of implications that need to be considered.
- The PSAB, at least in regard to Government Officers employed by Health Service Providers deals with disputes in regard to substandard performance and disciplinary matters including termination of employment (See Part 11 of the Health Services Act 2016.)
- On the face of the recommendation, the unfair dismissal aspects could be dealt with under s. 29 however there is no equivalent jurisdiction in regard to substandard performance, which would come under the jurisdiction of the Commission generally. (This would have the effect of denying individual employees making a claim in their own right in regard to substandard performance matters. Rarely used by individuals to our knowledge.)
- While admittedly, referring such matters to the Commission would increase the range of available remedies, without amendment to the jurisdiction of the Commission, it would change the way the jurisdiction is exercised and in doing so reduce the rights of employees. This is of particular significance in regard to disciplinary matters.
- The unfair dismissal jurisdiction of the Commission is a relatively harsh jurisdiction that favours employers. Employees charged with having committed a work misdemeanour, and having been found guilty and punished by the person who charged them, are faced with having to prove that the employer has done the wrong thing. i.e., acted harshly, oppressively or unfairly. (I am sure the police would like such a jurisdiction and the legal fraternity would loudly call foul.)
- The jurisdiction of the PSAB is exercised *de novo*, or afresh/from the beginning. This has significant implications in regard to what the respective parties are required to prove. It places significant onus on the employer to prove that what they allege actually occurred. The employee then is faced with proving the actions of the employer to be harsh, etc. Clearly this is preferable from the perspective of employees and, in our view, a more just and fairer way to deal with such matters.
- If the Jurisdiction of the PSAB is referred to the Commission, all unfair dismissal matters should be heard *de novo*, or better still, employers charging their employee with as workplace misdemeanour should be required to prove guilt and that the punishment fits the “crime”. The employee would then need only defend, as in criminal courts, rather than, as now in the Commission, where, in essence, they have to prove them self innocent, or at least less culpable and that the punishment metered out by the employer is harsh, oppressive or unfair..
- In addition to changes to the PSM Act, abolishing the PSAB would require amendment of part 11 of the Health Services Act.

- Our original submission to the Review in regard to removing the disciplinary and substandard performance provisions of the Health Act 2016, Part 11, stands – see page 6 of that submission.

In regard to the Public Service Arbitrator:

- The jurisdiction of the Arbitrator is significantly different to the jurisdiction of the Commission, which is why in the HSUWA's Submission to the Review we proposed retention of the separate jurisdiction (see pages 3 and 4.).
- The current jurisdiction of the PSA is carefully crafted and has a long history of serving all parties well. In our view there is no imperative to change it. With dual appointments to the Commission and the PSA, it does not cause any inefficiencies for the WAIRC as a whole. A minor amendment to the Act may be required to allow the Chief Commissioner to also be appointed as a PS Arbitrator.
- If the jurisdiction of the PSA was to be referred to the Commission, key elements of the jurisdiction would need to be retained unless the legislators wish to encourage public sector Unions to move to immediate industrial action or referral to the Commission every time a public sector employer makes a decision that impacts on its members in a manner it or its members disagree with.
- By way of explanation:
    - S.80E(1) provides that "… an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.".
    - Section 80E (5) provides that:

> (5) Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any government officer, or office under his administration, of any power in relation to any matter within the jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division. (Underlining added.)

    - Section 80G provides, *interalia,* that the general jurisdiction of the Commission applies, subject to the jurisdiction of the Arbitrator:

> (1) Subject to this Division, the provisions of Part II Divisions 2 to 2G that apply to or in relation to the exercise of the jurisdiction of the Commission constituted by a commissioner shall apply with such modifications as are prescribed and such other modifications as may be necessary or appropriate, to the exercise by an Arbitrator of his jurisdiction under this Act. (Underlining added.)

    - It is well established that for the purposes of the Act, Orders of the Commission are considered to be Awards.
    - In accordance with s.39.:

39. When award operates

(1) An award comes into operation on the day on which it is delivered or on such later date as the Commission determines and declares when delivering the award.

(2) Subject to subsection (3), the provisions of an award have effect on such day or days as is or are, respectively, specified in the award.

(3) The Commission may, by its award, give retrospective effect to the whole or any part of the award —

(a) if and to the extent that the parties to the award so agree; or

(b) if, in the opinion of the Commission, there are special circumstances which make it fair and right so to do,

but in a case to which paragraph (b) applies, not beyond the date upon which the application leading to the making of the award was lodged in the Commission. (Underlining added)

- However, in light of section 80G, and the jurisdiction of the Arbitrator as provided in ss80E (1) and (5), the PS Arbitrator is not restricted by s.39 of the Act in the same way as the Commission at large is. Accordingly, when it comes to decisions of the Arbitrator that involve overturning or modifying a decision of a Public Sector Employer, the order of the Arbitrator can and often does have effect from a date that significantly predates the lodgement of an application, and always predates the decision and any order of the Arbitrator.
- The effect of the modified jurisdiction of the Arbitrator in practice is that any industrial matter that is disputed before the PSA that arises out of a decision of a public sector employer can be overturned or varied by the Arbitrator with effect from the time/date the employer's decision was made.
- Axiomatically, a decision of a public sector employer cannot be contested before it has been made and so all applications to the Arbitrator postdate the decision of the employer.
- In operating in this way, the jurisdiction of the PS Arbitrator, as it currently stands, encourages the parties to act in a considered and civil manner when it comes to industrial disputes resulting from a decision of an employer.
- It encourages the parties to hold discussions. These are often quite lengthy and complex involving a range of decision makers and influencers before moving to a formal industrial disputation.
- Even where a matter is formally placed into dispute under the terms of the dispute settlement provisions of an industrial instrument the matter does not necessarily need to be immediately referred to the Arbitrator.
- Again, once the matter is referred to the Arbitrator, the parties with the assistance of the Arbitrator are able to take the time it takes to try and reach a resolution with the result that most matters are resolved at the Conference stage.
- Finally, once the matter goes to Arbitration, the pressure is not on for a rapid hearing process.
- All of this because the Unions are safe in the knowledge that the decision of the Arbitrator can take effect from the date of the original decision of the employer should the Arbitrator deem that fair and reasonable in the circumstances.

- In effect the jurisdiction of the PS Arbitrator as currently configured accommodates the complex and often slow decision making process of the public sector.
- In the absence of such protection, the first action of any responsible Union will be to lodge and application in the Commission before talking to the employer and to in effect obstruct any conciliation in order to force a quick decision, unless the employer provides an enforceable undertaking that they agree to an effective date that is no later than the date of the application. Or to simply resort to industrial action.
- While, in practice, in circumstances were to do otherwise would result in a serious injustice, the Commission has at times found ways to address an injustice that predates an application, this cannot be relied on.

- It is with the above in mind that we say that if the PSA is abolished the special jurisdiction of the PSA needs to be transferred to the Commission in regard to Government Officers.
- In considering the jurisdiction of the PSA and justification of a specialist jurisdiction, it needs to be kept in mind that very often, the non-delivery of public services is something that no one wishes to contemplate given the potential impact on the public interest.

In regard to the PSA and classification reviews.

- The PSA has a very specific jurisdiction in regard to determining and reviewing the classification of Government Officers.
- S.80E(2) provides:

> (2) Without limiting the generality of subsection (1) the jurisdiction conferred by that subsection includes jurisdiction to deal with —
>
> (a) a claim in respect of the salary, range of salary or title allocated to the office occupied by a government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him; and
>
> (b) a claim in respect of a decision of an employer to downgrade any office that is vacant.

- Pursuant to s.80F(2) classification claims can be referred to the Arbitrator by the government officer concerned or the organisation concerned.
- Both the classification jurisdiction and the rights to refer need to be maintained.

Paragraph 28 The WAIRC/PSA jurisdiction and appealing of standards, CI and Rules set by the PSC.

In the view of the HSUWA:

- The Commission/PSA should be given jurisdiction to review the application of the standards, CI's Rules etc in regard to industrial matters but have no role in the making of the these rules.
- To be very specific, in regard to the employment standard, the jurisdiction to review should go to the correct application of the employment procedure, but not to the question of merit, i.e., not the question of whether or not a particular applicant was the best applicant for the job. Limiting jurisdiction in regard to employment decisions to matters relating to the selection procedure would allow sufficient jurisdiction for the Commission/PSA to address the issues likely to lead to gross unfairness, such as , fair

and transparent process, patronage or nepotism, and other issues covered in s.7 (1) of the PSM Act, while avoiding the bad old days of public sector promotion appeals, which caused more harm than good.

- The HSUWA submission to the Review at pages 4 and 5, cover a range of important considerations in regard to this recommendation/request for additional submissions, not the least being that the standard maker should not be the reviewer of their application, and the current lack of judicial review of the application of the standards, etc., set by the PSC. (See also the paper of Justice Martin, attached to our Submission to the Review.)
- It would also remove significant inefficiencies in the way in which grievances under the PSM Act are currently handled. Most matters would receive a quick airing in a conference in the Commission, which, in our experience would lead to an acceptable resolution in a high proportion of cases.
- The standards, etc., were introduced as one of the bulwarks against corruption following WA Inc. In the absence of an effective and independent system that enables their application to be openly scrutinised and any failings addressed, in the absence of an easily accessible review process, such as, access to the Commission/PSA, they currently do not fully serve their role.

Paragraph 30 Bullying Jurisdiction

- A stated in our submission to the review at page 6., the HSUWA is of the view that inclusion of bullying provisions into the WA IR Act or its replacement, similar to those contained in Part 6-B of the Fair Work Act, would significantly improve the capacity of the Commission to deal with bullying matters and accordingly provide an incentive for employers to better address the issue.

Paragraph 33. Repeal s.78 of the PSM Act and give the WAIRC jurisdiction to make general orders in regard to PS discipline matters

- It is unclear in the reference to repealing s.78 of the PSM Act whether the intention is the repeal of s.78, or of Part 5 of the PSM Act. We believe the intention of the recommendation may be the latter, given the recommendation in full.
- If our understanding is correct, given that for employees covered by the Health Services Act 2016, Public servants employed by the DOH and employees of the Health Service Providers, Part 5 of the PSM Act is, in effect, replicated in Part 11 of the Health Services Act, but not only applies to Public Servants but to all employees, part 11 of the Health Services Act would also need to be repealed to fully effect the recommendation.
- With the above caveat and speaking in regard to our members, we support the recommendation.
- In supporting the recommendation we would add that we believe there is no evidence supporting the currently excessively complex provisions of Part 11 of the Health Services Act over the disciplinary provisions of the industrial instrument covering our members that have proven more than adequate for purpose over many decades. In our view the cost and complexity imposed as a consequence of Part 11 of the Health Services Act and Part 5 of the PSM Act are not justified by any measure.
- The HSUWA's submission to the Review at page 6 canvased this issue also.

<u>Other recommendations of the Interim Report</u>

As stated at the outset of this submission, the HSUWA adopts the submissions of Unions WA, provided that subject to any inconsistencies, our submissions prevail.

We thank the Review for the opportunity to make both written and verbal submissions to the review. Should these or our verbal submissions raise any matters that the Review would like to further explore with the HSUWA or for the HSUWA to provide a specific submission on, we would be pleased to assist.

Chris Panizza
Assistant Secretary